(5)

No. 96-270

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

AMCHEM PRODUCTS, INC., ET AL.,
Petitioners,

v.

GEORGE WINDSOR, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION OF RESPONDENTS WHITE LUNG ASSOCIATION OF NEW JERSEY, ET AL.

BRIAN WOLFMAN
Counsel of Record
ALAN B. MORRISON
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, NW
Washington, D.C. 20009
(202) 588-1000

Attorneys for Respondents
White Lung Association of
New Jersey, et al.

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QUESTION PRESENTED

Should this Court grant review to decide whether the court of appeals correctly determined that this novel "futures-only" class action failed to meet the requirements of typicality, adequacy of representation, predominance, and superiority under Federal Rule of Civil Procedure 23, where there are substantial issues of justiciability, subject matter jurisdiction, and due process that would likely preclude approval of the settlement in any event?

PARTIES TO THE PROCEEDING

Petitioners have listed the parties below in the appendix to the petition at 292a. Respondents who were appellants below and who appear in this Brief in Opposition are the White Lung Association of New Jersey, the National Asbestos Victims Legal Action Organizing Committee, the Oil, Chemical, and Atomic Workers International Union, the Skilled Trades Association, Myles O'Malley, Marta Figueroa, Robert Fiore, Ron Maher, and Lynn Maher (in her own behalf and as next friend for her minor children, Jessica Marie Maher, Jamie Marion Maher, and Jennifer Megan Maher).

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This case involves a class action settlement of asbestos personal-injury claims against the Center for Claims Resolution ("CCR")—a consortium of twenty asbestos-producing defendants. The settlement was devised not to provide benefits to individuals who have already sustained legal injuries, but rather to resolve the "claims" of class members who *may* suffer injuries in the future. In the process, the settlement virtually eliminates the claimants' access to court and substitutes an alternative dispute resolution mechanism conceived wholly by the settling parties' attorneys. The court of appeals unanimously rejected the settlement as a classic, albeit extreme, attempt at judicial legislation: "In short, we think that what the district court did here might be ordered by a legislature, but should not have been ordered by a court" (59a).

CCR, but not the representatives of the plaintiff class for whose benefit the settlement was supposedly crafted, now seeks review of the court of appeals' holding that this case should not have been certified as a class action under Federal

Rule of Civil Procedure 23. The plaintiffs' abandonment of the settlement, in and of itself, requires that the petition be denied. Beyond that, the decision below involves no significant conflict among the courts of appeals and is true to both the text and purpose of Rule 23. Moreover, because of the presence of independent grounds for the court of appeals' decision, the result below—rejection of the settlement—will endure regardless of the Court's resolution of the single question presented. Finally, a ruling from this Court may well be unnecessary because a proposed amendment to Rule 23 on the very question on which petitioners seek review has recently passed through the Judicial Conference's Standing Committee on Rules and entered the formal comment period.

STATEMENT OF THE CASE

A. The Class Action "Suit."

In mid-1991, the Judicial Panel on Multidistrict Litigation transferred all federal asbestos personal-injury cases to the Honorable Charles Weiner of the Eastern District of Pennsylvania for the purpose of exploring settlement options. *In re Asbestos Prod. Liab. Litig.*, 771 F. Supp. 415, 416 (J.P.M.L. 1991). Later that year, the CCR defendants approached two plaintiffs' asbestos lawyers, Ronald L. Motley and Gene Locks, for the purpose of negotiating a settlement, not of the cases that the Panel had transferred, but of all asbestos claims against the CCR defendants that had not yet been filed, but might be filed in the future.

On January 15, 1993, that settlement was reached, and Messrs. Motley and Locks filed the complaint in this case, seeking an opt-out class under Rule 23(b)(3). At the same time, CCR filed its answer, and all parties signed and filed a Stipulation of Settlement. Shortly thereafter, the CCR defendants conceded that the case, involving the disparate claims of millions of class members under the laws of all 50

jurisdictions—some with serious diseases, some with relatively minor asbestos-related impairments, and the vast majority with no illness at all—could not be litigated as a class action. Third Circuit Joint Appendix ("JA") 456-57. Although nominally styled as a case brought by named plaintiffs against CCR, there is no dispute that, in the words of CCR's chief executive officer, CCR "picked" Motley and Locks for the purpose of negotiating a settlement, which would, in turn, become a friendly lawsuit whose sole purpose is to substitute an extra-judicial asbestos claims procedure for the remedies available in the court system. JA 1190-93.

The class—which may include as many as 20-30 million people (JA 876)—was defined to include all U.S. residents occupationally exposed to asbestos for whom CCR defendants may now, or at any time in the future, bear legal liability, as well as all individuals residing with, or related to, such persons, to whom CCR may be legally liable. JA 337. Specifically excluded are all individuals who had brought suit against one or more of the CCR defendants prior to January 15, 1993, the date of the settlement.

The exclusion of previously-filed suits was critical to class counsel who, while professing to endorse the class settlement, effectively opted-out their presently-injured clients from the class and settled their claims for $215 million in cash (including at least $70 million in attorney's fees), rather than putting those claimants through the class settlement's administrative scheme. JA 1399. These side-settlements, the most important of which were signed on the eve of the filing of the class action, were agreed to by CCR only after it believed that the class action settlement would be consummated. JA 1201, 1259, 1294. Not only did the side-deals pay class counsel's "present" clients far more than they could hope to obtain under the class action settlement, *see, e.g.*, Obj. Ex. O-170, but they paid cash for certain illnesses, such as many asbestos-related lung cancers, that would not qualify for compensation at all under that settlement. *See, e.g.*, JA 1300-01.

The vast majority of the class members were so-called "exposure-only" plaintiffs—individuals who had been exposed to CCR asbestos-containing products, but who suffered from no asbestos-related disease. JA 817-18. The class complaint alleged three bases for recovery of damages for the exposure-only plaintiffs: negligent infliction of emotional distress, increased risk of a future condition, and medical monitoring. JA 288-91. The complaint did not request any of the relief agreed to in the simultaneously-filed class settlement, and none of the relief actually provided in that settlement corresponds with the money damages nominally sought in the complaint.

Instead, the settlement established a procedure under which class members may file claims if they develop an asbestos-related illness. Under it, the CCR defendants and, if appealed by a class member, arbitrators appointed by the parties, decide whether the claimant satisfies the settlement's strict medical criteria for compensation. JA 348-77. Once medical eligibility is established, CCR itself, without any independent review, makes decisions on payment levels, within broad ranges, on more than 98% of all claims. JA 385-87. After completing the administrative process, claimants who meet the medical criteria may, in theory, seek arbitration or relief in the tort system (subject to numerous procedural requirements and a waiver of all punitive damages), JA 396-402, but fewer than 1% of all claimants may do so in any one year. JA 437, 517. Thus, even if just a small percentage of class members seek such relief, the pre-filing backlog will shortly exceed 15 years. *See, e.g.*, JA 808.

Nominally, the settlement requires that claimants be paid within about nine months of the filing of a qualifying claim. JA 344, 385-86. Payment, however, is subject to strict yearly case-flow maximums, and if the number of eligible claims exceed those maximums, JA 382, 436, which is likely in light of historical data, payments could be delayed for many years.

B. Proceedings Before The District Court.

Various class members, labor unions, and asbestos advocacy organizations objected to the settlement, arguing that it was grossly unfair and beset by fundamental legal impediments. As to the former, objectors argued, among other things, that (1) contrary to the principles of federalism established by *Erie R.R. v. Tompkins*, 304 U.S. 64, 78-80 (1938), the settlement prospectively extinguishes certain of the class members' valuable state-law causes of action, which have historically been settled by CCR for substantial amounts of money; (2) the CCR defendants, and not a neutral decisionmaker, control the claims procedures, and retain, in almost all cases, unreviewable authority to set monetary awards for eligible class members at amounts drastically below those paid in the tort system; and (3) the settlement fails to adjust class members' recoveries for inflation, a problem exacerbated in this "futures" class action by the fact that the class members are bound to the settlement in perpetuity, while each defendant is granted an unqualified opportunity to abandon the settlement after 10 years.

Most important for present purposes, the objectors challenged the court's legal power to bind the absent class members on four distinct, but related grounds. First, they argued that this was a feigned or collusive case, not susceptible to resolution under Article III's case or controversy requirement, because there was no dispute among the parties when the case was filed and the plaintiffs never intended to pursue any of the relief allegedly sought in the complaint. This was made plain not only by the lack of any relation between the relief purportedly sought in the complaint and that obtained in the settlement, but also by the testimony of the named plaintiffs, each of whom expressly renounced the claims in the complaint and proclaimed no intention of seeking money damages because they had not sustained any asbestos-related injuries. As one named plaintiff put it, "I have nothing wrong with me. So

therefore, I should not and will not seek any damages or actions." JA 1265.

Second, objectors maintained that the none of the exposure-only class members had the requisite $50,000 in controversy to establish diversity jurisdiction under 28 U.S.C. 1332, since the causes of action pled were not valid causes of action in most, if not all, jurisdictions. The lack of a good faith allegation of $50,000 in damages for each class member was buttressed as well by the named plaintiffs' testimony which, again, demonstrated that the complaint's damages allegations were a sham. *See, e.g.*, JA 1124-25, 1162, 1178-79, 1181A; 62a-66a.

Third, objectors maintained that the notice to the class was ineffective under the due process clause and Rule 23 because it was impossible to notify millions of "future" class members to alert them to their opt-out rights. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-13 (1985). Objectors pointed out that the *uninjured* plaintiff class would have no reason to heed a notice because many class members knew nothing of their exposure, and that, even for those who did, it was fundamentally unfair to force individuals to opt out before they knew the extent of their injuries or what their personal circumstances would be at the time they became ill. *See Barry v. Barchi*, 443 U.S. 55, 66 (1979)(relinquishment of state-created property rights may only be demanded "at a meaningful time and in a meaningful manner").

With respect to the argument that formed the basis for the court of appeals' decision, objectors challenged class certification under Rule 23. They argued that it was impossible to meet Rule 23(a)(3)'s requirement that the claims of the representative plaintiffs be "typical" of the class, since no class representative could be said to be "typical" of any, let alone *all*, future asbestos victims whose circumstances were unknown and unknowable. The objectors also contended that the case did not present common questions of law and fact under Rule 23(a)(2), and that any common questions did not predominate over the

case's individual questions under Rule 23(b)(3). Specifically, they pointed out that the vastly different factual and legal circumstances of the individual members of the class—involving claims arising under the laws of 50 jurisdictions that would affect class members in vastly different ways—precluded certification.

Finally, the objectors contended that Rule 23(a)(4)'s adequacy of representation requirement had not been met. The settlement terms themselves indicated that the class representatives could not, with one set of lawyers, represent *all* the class members, some of whose claims were abrogated, or made virtually worthless, in order to enhance the position of other claimants. Similarly, the objectors pointed to class counsel's decision to benefit their "present" clients outside the class, by obtaining the $215 million side-deals, implicitly diminishing the recoveries of the class members.

The district court rejected each of respondents' arguments and approved the settlement. *See Georgine v. Amchem Products, Inc.*, 157 F.R.D. 246 (E.D. Pa. 1994); *Carlough v. Amchem Products, Inc.*, 834 F. Supp. 1437 (E.D. Pa. 1993). CCR then moved for an injunction that would bar any class members from suing the CCR defendants for asbestos-related injuries in federal or state court, and require them to use the settlement's claims procedure to obtain compensation. At this point, certain class members who had been diagnosed with asbestos-related diseases *after* the opt-out period ended, and who never received notice of the class action, entered the case to argue against the injunction. *See, e.g.*, Dkt. No. 1161. On September 21, 1994, the district court granted a preliminary injunction, JA 1034, and respondents appealed that order under 28 U.S.C. 1292(a)(1), arguing that, because the district court lacked subject matter jurisdiction and the power to bind the absent class members under both the due process

clause and Rule 23, the preliminary injunction should be vacated.[1]

C. The Decision of the Court of Appeals.

The court of appeals unanimously reversed in an opinion by Circuit Judge Edward M. Becker. It began by describing the "most notabl[e]" aspect of the settlement—that it did not resolve the claims of those who had suffered injury, but of those who had not (17a-18a)—and by expressing "serious doubts as to the existence of the requisite jurisdictional amount, justiciability, adequacy of notice, and personal jurisdiction over the absent class members" (19a). In order to avoid ruling on these fundamental constitutional problems, the court held that "this class meets neither the [Rule] 23(a) requirements of typicality and adequacy of representation, nor the 23(b)(3) requirements of predominance and superiority" (19a). In so holding, the court rejected CCR's two related contentions—that Rule 23's certification criteria should be applied more liberally in a settlement context and that the court's review of the settlement terms may substitute for strict application of the certification criteria to the claims pled in the complaint.

Judge Becker relied on the Third Circuit's recent decision in *In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.* ("*GM Trucks*"), 55 F.3d 768, 799 (3d Cir.), *cert. denied*, 116 S. Ct. 88 (1995), which had held

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[1] By its own terms, 157 F.R.D. at 338, and by law, the district court's fairness decision was not a final appealable decision, because a third party complaint by CCR against its insurers remains pending (*see* 24a n.4, 34a). Thus, despite petitioners' statement to the contrary (Pet. 25), respondents do contend that the settlement is grossly unfair, but remain unable to challenge the district court's fairness determination in the absence of a final order.

that neither the purpose or text of Rule 23 "authorize[d] separate, liberalized criteria for settlement classes." The court acknowledged that *GM Trucks* had dealt expressly only with the criteria under subsection (a) of Rule 23, but then determined that, for the same reasons given in *GM Trucks*—the Rule's text and purpose in protecting "absent class members' rights" (38a)—strict application of Rule 23(b)(3)'s predominance and superiority criteria was also required.

The court then explained that, in order to obtain certification of any class action, the district court must first find that Rule 23(a)'s numerosity, commonality, typicality, and adequacy of representation requirements are met, and then that the class falls within one of Rule 23(b)'s three subdivisions (38a). The court initially examined whether common questions of law and fact exist (Rule 23(a)(2)) and whether such common questions "predominate over any questions affecting only individual [class] members" (Rule 23(b)(3)). In doing so, it discussed the large number of individual factual variations, such as differences in types of illness and smoking history, particularly regarding the "futures plaintiffs [who] share little in common, either with each other or with the presently injured class members" (41a). These differences translated into significant legal variations regarding causation, comparative fault, and the types of damages available to each class member. The problem was "compounded exponentially" by choice-of-law issues in this nationwide diversity class action, which demanded application of the law of all 50 states on a range of issues, such as statutes of limitations, the viability of "exposure-only" causes of action, causation, and the like. *See* 41a (citing *Shutts*, 472 U.S. at 823).

Despite these problems, the court of appeals declined to rule that the class did not satisfy the commonality requirement of Rule 23(a)(2); however, it did conclude that the sole common issue of asbestos' harmfulness could not support a finding that the common questions *predominated*

over the individual questions under Rule 23(b)(3). The court also pointed to the consistent refusal of the courts to certify mass-tort cases, and the Advisory Committee Note making clear that Rule 23 certification was not intended to apply to such cases (43a-48a).

Turning to Rule 23(a)(4), the court further concluded that "serious intra-class conflicts preclude this class from meeting the adequacy of representation requirement" (49a). The court looked to the settlement itself, noting that it "makes numerous decisions on which the interests of different types of class members are at odds" and that such decisions "necessarily favor some claimants over others" (49a). Thus, the court observed, some claimants would obtain benefits on relatively favorable terms, while those with claims of asymptomatic pleural thickening, medical monitoring, or loss of consortium would receive no damages at all, and others, such as mesothelioma victims, would get far less than they would in the tort system (49a).

The "most salient conflict," the court concluded (49a), was between presently-injured and future class members; the former would want to maximize current benefits, while the latter would want protections, such as an adjustment for inflation or a back-end opt-out procedure (which allows the class member to opt-out at the time injury is sustained), neither of which the settlement provided. The lack of any such protections "thwarted the adequate representation of the disparate groups of plaintiffs" (52a).

The Third Circuit also held that typicality—which demands alignment between the claims of the named representatives and the absentees—was lacking, because the same "hodgepodge" of claims (53a) and factual variations that plagued the commonality inquiry and defeated adequacy of representation made it impossible for a class member's claim to be "typical" of that of any other class member. This was particularly true, the court held, because of the clash between presently-injured and future class members, but would also have been true if the class contained only

"futures," since their circumstances are inherently unknowable and the types of diseases they might contract vary widely (53a).

Finally, the court found that class treatment was not "superior" to individual adjudication under Rule 23(b)(3), relying mainly on fairness concerns about the settlement itself. It noted, first, that class members had significant interests in controlling their own litigation, because asbestos personal-injury claims, as opposed to the kinds of small claims for which Rule 23(b)(3) was intended (55a), are judicially viable on their own. Second, the court relied on the inherent problems of providing adequate notice in a "futures" class action. Because the class is composed primarily of uninjured persons, they would have little reason to pay attention to the class notice, especially those who know nothing about their own asbestos exposure (55a, citing testimony of two named plaintiffs who were unaware of their own exposure until their spouses became ill from asbestos). Thus, the court held, binding them could not be deemed superior to individual actions brought when a class member suffers an asbestos-related injury. The panel supported its notice concerns by explaining that the latency period for asbestos-related disease can be very long, and that one particularly horrible disease—mesothelioma—can be contracted through incidental exposures. The court thus concluded that "we cannot conceive of how any class of this magnitude could be certified" (57a).

Circuit Judge Harry W. Wellford filed a concurrence, noting his agreement with Judge Becker's opinion, and further holding that the plaintiffs' mere exposure to asbestos fibers did not constitute "injury in fact" sufficient to confer standing (60a). Judge Wellford explained that individuals with only speculative, future injuries did not present an Article III case or controversy, buttressing his explanation with the testimony of the class representatives which, as noted above, expressly renounced any present intention of seeking damages. *See* 62a-66a (quoting testimony).

Judge Wellford's apprehension about the proper role of the courts thus struck the same chord as the panel's conclusions, albeit in a different key. While expressing concern over the large number of asbestos claims, the court of appeals made clear that the courts were not the place to seek mass-tort reform (57a-58a). The court was thus determined to "leave legislative solutions to legislative channels" (20a). "In doing so," the panel concluded (20a), "we avoid a serious rend in the garment of the federal judiciary that would result from the Court, even with the noblest motives, exercising power that it lacks."

REASONS FOR DENYING THE WRIT

Before explaining why the bases suggested by petitioners for granting review should be rejected, there is a prior insuperable obstacle to a grant of certiorari in this case—the class plaintiffs' decision not to seek review of the Third Circuit's ruling. After having lost in the court of appeals, and with their lucrative side-settlements still intact, class counsel decided not to seek review and thereby abandoned the settlement and the class members who they, *not CCR*, are duty bound to serve. Ordinarily, the absence of a key party would be reason enough to deny certiorari. But here, in a class action—particularly one in which the named plaintiffs' adequacy to represent the class members is at the heart of the dispute—it would be especially inappropriate for this Court to decide the matter when the court-appointed representatives of the class have chosen not to assert the class members' interests. After all, as CCR admits (Pet. 5-6), the class settlement is supposed to be for the benefit of the class, but their champions have decided to drop their quest for its approval.

Quite apart from these prudential considerations, the class plaintiffs' failure to seek review effectively bars resurrection of the class settlement, thus making CCR's petition to this Court entirely hypothetical. Put another way,

class counsel's failure to seek certiorari binds the class members to the decision below and precludes them from seeking its reinstatement. A class settlement is a contract that may only be enforced if it is endorsed by *all* the parties *and* it gains court approval. *See* Fed. R. Civ. P. 23(e). The court of appeals ordered the district court to decertify the settlement class (59a), thus invalidating the settlement, *see* Settlement, ¶ XXII.G.4, JA 432, which necessarily included certification of the class. That being the case, the settlement may go forward only if all the settling parties (not just the defendants) continue to seek and eventually obtain its judicial enforcement. Because the plaintiffs no longer seek such approval—perhaps because they believe it futile, or perhaps because they no longer support the settlement—the settlement is defunct, and review should be denied for that reason alone.

We now turn to the matters addressed in the petition and show why, apart from class counsel's abandonment of the settlement, review should be denied.

A. There Is No Substantial Conflict Among The Circuits.

In the main, the appellate decisions relied on by petitioners do not support the proposition that Rule 23's certification requirements can be ignored, or applied more liberally, in the settlement context. For instance, *In re A.H. Robins Co., Inc.*, 880 F.2d 709 (4th Cir.), *cert. denied*, 493 U.S. 959 (1989), a mass-tort personal-injury class action involving claims against the insurer of a bankrupt medical device manufacturer, is distinguishable because class certification was granted under the non-opt-out provisions of Rule 23(b)(1)(A), not Rule 23(b)(3), the Rule applicable here. In any event, *Robins* did *not* decide whether the Rule 23 criteria apply differently to a settlement class. To the contrary, its class certification discussion begins by noting that a class action "must satisfy all *four* steps of the

prerequisites mandated by subsection (a) of the Rule ... [and] fit within at least one of the three categories of actions identified in subsection (b) of the Rule." 880 F.2d at 727-28 (emphasis in original).

Robins' main focus was on whether mass-tort class actions can be maintained at all under Rule 23(b), and said at the very end of its discussion that "settlement should be a factor" in class certification. *Id.* at 740. That passing dictum appeared in the context of noting that settlement class actions are permissible under Rule 23, *id.* at 738, a point with which the Third Circuit concurs (36a).

Similarly, in *In re Dennis Greenman Securities Litig.*, 829 F.2d 1539 (11th Cir. 1987), the court emphasized that settlement classes "must satisfy" the Rule 23(a) and (b) requirements, and the lower court's Rule 23(a) certification was not even challenged. The appellant argued only that the district court had certified the case under the wrong subsection of Rule 23(b), with which the Eleventh Circuit agreed. *Id.* at 1544 & n.5. While adverting in dicta to a "special standard" used in reviewing "settlement certifications," the court stated that "*this case is meaningfully different*," as the case was not a settlement class since "the district court certified a class action prior to the commencement of settlement negotiations." *Id.* at 1543.

Officers for Justice v. Civil Service Comm'n, 688 F.2d 615 (9th Cir. 1982), also relied on by petitioners, is simply not on point. There, the challenge to the settlement did not even raise the question whether the criteria for certifying settlement classes are less stringent than for litigation classes. Indeed, the district court had certified the case *for litigation* under Rule 23(b)(2) for equitable relief, and under Rule 23(b)(3) for damages, and class members were given the right to opt out. An objector who did not opt out at the time of certification then complained because a later-achieved settlement did not give him *another* chance to do so. The Ninth Circuit simply held that neither the Rule nor due

process demanded that class members "be given a second chance to opt out." *Officers for Justice*, 688 F.2d at 635.[2]

Although the foregoing precedents are not in conflict with the decision below, we acknowledge that a recent opinion of the Fifth Circuit, *In re Asbestos Litigation*, 90 F.3d 963 (1996), presents a different situation. There, in approving a settlement of future asbestos claims, the court asserted that the Third Circuit "has refused to look at settlements before it when deciding class certification issues." *Id.* at 975. That assertion is incorrect because, in both *GM Trucks* and the decision below, the Third Circuit looked at the settlement in detail in deciding that Rule 23's adequacy of representation, typicality, and superiority requirements had not been met. *See supra* at 10-11 (settlement terms here revealed insuperable class conflicts); *GM Trucks*, 55 F.3d at 796, 801 (noting that "evaluating the settlement can yield some information relevant to the adequacy of representation determination," and pointing to "conspicuous evidence of ... an intra-class conflict in the very terms of this settlement"). Thus, contrary to the Fifth Circuit's characterization, the decision below recognized that consideration of the settlement "enhances the ability of

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[2] Petitioners also rely on *Weinberger v. Kendrick*, 698 F.2d 61 (2d Cir. 1982), *cert. denied*, 464 U.S. 818 (1983), to show a circuit split, citing it for the proposition that settlement classes are permissible. But that holding is, as we have said, consistent with the Third Circuit's position (36a). Moreover, the principal holding in *Weinberger*—that settlement classes require a "clearer showing of a settlement's fairness, reasonableness and adequacy" than do "cases ... where a class has been certified and class representatives have been recognized at an *earlier date*," *id.* (emphasis added)—strongly suggests that strict certification findings under Rule 23(a) and one part of Rule 23(b) must be made at some point in every class action.

district courts to make informed certification decisions." *In re Asbestos*, 90 F.3d at 975.

The Third Circuit did hold that analysis of the settlement is not sufficient alone to satisfy the class certification criteria, and thus is not a *substitute* for the district court's obligation to find that the *claims in the complaint* meet the requirements of Rule 23. It did so because the principal purpose of the certification requirement is to protect the absent plaintiffs whose claims in the class complaint are compromised by the settlement. *See* 36a-37a (citing *GM Trucks*, 55 F.3d at 799). Although the Fifth Circuit did not explicitly reject this aspect of the decision below, we acknowledge that it implicitly did so because it looked *solely* to the circumstances of the settlement in its class certification analysis. *In re Asbestos*, 90 F.3d at 975-84.

However, even on this score, *In re Asbestos* does not present a direct circuit conflict, because it involved a non-opt out class action certified under Rule 23(b)(1)(B), whereas this case and *GM Trucks* both involved Rule 23(b)(3) classes. Significantly, the *GM Trucks* panel limited its holding to cases for which certification is sought under subdivision (b)(3), 55 F.3d at 796 n.18, and the panel in this case reiterated that concern in the Rule 23(a) context. *See* 43a (declining to find a lack of commonality under Rule 23(a)(2), because doing so "might have repercussions for class actions very different from this case, such as a Rule 23(b)(1)(B) limited fund class action, in which the action presented claimants with their only chance at recovery").

Indeed, the differences between Rules 23(b)(1)(B) and (b)(3) are significant. In *In re Asbestos*, the Fifth Circuit held that a settlement of future claims against the Fibreboard Corporation had been properly certified because, in its view, Fibreboard's current and future asbestos liabilities were such that the settlement presented the only way to preserve the company's diminishing assets other than through bankruptcy. *In re Asbestos*, 90 F.3d at 982. The settlement proceeds

were to be paid out of a parallel settlement (also approved by the Fifth Circuit) between Fiberboard and its insurers which constituted, the Fifth Circuit held, a "limited fund." *Id.* at 983-84. According to the Fifth Circuit, the limited fund justified class certification, because, in the words of Rule 23(b)(1)(B), individual adjudications against Fibreboard "would as a practical matter be dispositive of the interests" of the other class members, or "substantially impair or impede their ability to protect their interests" in Fibreboard's assets. *In re Asbestos*, 90 F.3d at 984.

Therefore, according to *In re Asbestos*, the class claims were akin to a joint claim for equitable distribution of common property. In those circumstances, arguably the Rule 23(a) inquiry merges with an analysis of the settlement terms because the class claims seek unitary resolution of a commonly held interest in maximizing the claimants' pro-rata recoveries from the limited fund. But that holding is irrelevant to this case which involves individual money damages claims against highly solvent defendants, and in which the claims in the complaint—which is the proper focus of the class certification inquiry—are unrelated to the terms of the settlement.

In sum, neither *In re Asbestos* or the other circuit authority upon which petitioners rely creates a significant conflict warranting this Court's review.

B. There Is An Independent Basis For The Third Circuit's Decision That Was Omitted From The Petition.

Even if there were a direct and substantial conflict, there is an alternative and independent ground for the Third Circuit's decision that supports denial of the petition. The principal holding below was that a Rule 23(b)(3) settlement class action could be certified if, after application of the certification criteria, the case could be litigated as a class action. In addition, the court held that, by virtue of the

settlement terms themselves, there were conflicts of interest between currently-injured class members and those who may suffer injuries years from now that required decertification of the class.

Thus, the court of appeals noted that, while currently injured claimants might be satisfied with the settlement's strict monetary limitations, future claimants would want protections against inflation, spend-thrift provisions, a bar against companies exiting the settlement (which the settlement permits after 10 years), and their own opportunity to opt out of the settlement, not at the front end, but when their injuries arose (49a-50a). In ordering decertification, the court also relied on the settlement's creation of other conflicts among class members, such as the fact that the settlement extinguishes all claims for medical monitoring, which might be valuable for "exposure-only" class members, but not for those already ill, and that it eliminates loss of consortium claims without any compensation, an implicit trade-off that harms some class claimants while benefitting others (49a).

These independently dispositive rulings of the court of appeals (48a-52a), while no doubt rulings with which petitioners disagree, have nothing to do with the question presented in the petition. In fact, they do *precisely* what petitioners say a court should do—they look to the settlement terms themselves in considering class certification. Thus, even if this Court grants certiorari and holds, as petitioners urge, that some lesser standard of class certification is permissible in the settlement context, the result in this case will not change. In short, "the class certification issue[] raised in the petition [is] unlikely ever to affect the class members or petitioner[s]" (Pet. 16 n.12), and review should be denied on that basis alone.[3]

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[3] In the same vein, the Third Circuit indicated that the (continued...)

C. Other Factors Make This Case A Poor Candidate For Review.

The class certification issue decided below did not arise in a vacuum, but rather as part of an attempt to exclude *future* claimants from the tort system and bind them to a CCR-run claims procedure. As a result, the case presented fundamental issues of justiciability, subject matter jurisdiction, and due process. The presence of these challenges, whose potency the court below acknowledged (19a, 30a-31a), makes it highly unlikely that the settlement can ever be revived.

Aside from the fairness concerns that plague this case (*see supra* at 5), the justiciability and amount-in-controversy problems are so great that it is likely that the Court would never reach a decision on the question presented. And, even if this Court declined to consider the issues relating to subject matter jurisdiction, a ruling favorable to petitioners on the question presented alone would provide neither the parties here, nor the world at large, adequate guidance about the legality of the type of "futures" settlement that CCR seeks to impose. Similarly, the due process question—whether it was permissible to bind huge numbers

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[3](...continued)
impossibility of providing adequate notice presented a serious question of unfairness for class members who are uninjured and therefore highly unlikely to be aware of the action or have adequate information to make an informed decision about whether to opt out of the case. Although this part of the decision was made under Rule 23(b)(3)'s superiority requirement, these problems are inherent in the *settlement itself* because of its inclusion of *future* personal-injury claimants. Thus, regardless of the Court's ruling on the question presented, the Third Circuit's ruling in this regard will stand.

of unknowing and unknowable class members to a settlement that abrogates their rights of access to the tort system *before* their claims accrue—presents a substantial barrier to upholding the settlement. Thus, the Third Circuit termed this argument "powerful" (31a), and relied on these concerns in its Rule 23(b)(3) superiority analysis (55a-57a), underscoring the likely fate of the settlement even if this Court agrees with petitioners on the Rule 23 question. For these reasons as well, review should be denied.

D. A Pending Proposal To Amend Rule 23 Makes Review Here Particularly Inappropriate.

The Judicial Conference's Standing Committee on Rules of Practice and Procedure has recently recommended, over strenuous objection, that Rule 23 be amended on the precise issue presented in the petition. *See* Pet. 20-21. If the amendment is approved, courts will be authorized to certify classes for settlement purposes that would not otherwise meet the criteria for litigation under Rule 23(b)(3). As such, the proposed rule would effectively modify the reasoning of the the opinion below, to the extent that it holds that the standards for certifying a class under Rule 23(b)(3) are the same in both the settlement and litigation contexts. This provides a powerful additional reason to deny review. The Rules amendment process devised by Congress (in which this Court has a significant role) should be allowed to run its course, since whatever the outcome, it will almost surely obviate the need to rule on the question presented here.

Moreover, the content of the proposed rule provides another reason why certiorari should be denied. The proposed rule would add a new subsection (b)(4) to Rule 23, permitting parties who had settled a Rule 23(b)(3)-type class action to be certified for settlement purposes, even though it might not meet Rule 23(b)(3)'s superiority and predominance requirements in the litigation context. *See* Advisory Committee Notes to Draft Rule 23 (on file at Committee on

Rules of Practice and Procedure, Admin. Office of U.S. Courts, Washington, D.C.). The proposed rule makes clear, however, that a (b)(4) class would be required to meet all of the certification requirements under subsection (a) of Rule 23 on the same terms as an ordinary Rule 23(b)(3) litigation class.

Here, however, while the Third Circuit did state that the Rule 23(b) requirements for litigation and settlement were the same, it *also* decertified the class on entirely independent grounds—failure to meet the *Rule 23(a)* typicality and adequacy of representation requirements. To our knowledge, no court has ever held that these fundamental Rule 23(a) requirements, which were included for the protection of the absentees, can be overlooked in the context of a settlement class certified under present Rule 23(b)(3), nor could they be under the proposed amendment. *See* Pet. 20. Therefore, review should be denied because, regardless of how this Court rules on the merits of the Rule 23(b)(3) question presented, or how the Rules Committee process is resolved, the result in this case will remain the same.

E. The Decision Below Is Consistent With The Language And Purpose Of Rule 23 And With Decisions Of This Court.

Building on its *GM Trucks* decision, the court of appeals correctly held that the language of Rule 23 does not admit of separate, liberalized criteria for settlement class actions. The Rule states simply that "[a]n action may be maintained as a class action if [the four] *prerequisites* of subdivision (a) are satisfied, and in addition" one of the parts of subdivision (b) is met. Fed. R. Civ. P. 23(b) (emphasis added). Further, the certification standards themselves—when they refer to "common *questions* of law and fact" and to typical "*claims* and defenses"—are plainly speaking of certification based on the complaint, not a settlement.

Petitioners strive mightily to find language in the Rule that would allow them to relax or ignore these requirements (Pet. 22-25), but there is none. They rely heavily, for instance, on Rule 23(b)(3)(B), which permits the court, in its certification inquiry, to consider whether litigation has already been commenced against the defendant. That language says nothing about whether the court is free, as petitioners claim, to avoid strict imposition of the Rule 23(a) prerequisites and the other requirements of Rule 23(b). Indeed, subdivision (b)(3)(B) was not intended to relax the Rule's other criteria, but to provide an additional *barrier* to certification in cases where the subject matter of the proposed class action has already progressed in other litigation. *See* C. Wright, A. Miller, & M. Kane, 7A *Federal Practice and Procedure* § 1780, at 569-70 (2d ed. 1986).

Moreover, petitioners' interpretation of the Rule is at odds with the teachings of *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147 (1982), an employment discrimination class action in which the Court held that a Mexican-American employee, who was denied a workplace *promotion*, could not represent a class of Mexican-American job *applicants*. Although *Falcon* did not involve a settlement class, the Court's holding that "actual, not presumed, conformance with Rule 23(a) remains...indispensable[,]" 457 U.S. at 160, was not in any way restricted to class actions that were to be litigated. Indeed, if the differences between the class representatives and the absentees in *Falcon* defeated a claim to class certification, then this case does not even remotely justify certification, where a handful of representatives purport to seek relief over a dizzying array of unlawful conduct under the laws of 50 jurisdictions, and claim to represent the victims of *future* injuries, whose circumstances are obviously unknowable. Thus, *Falcon*'s holding that a class action "may only be certified if the trial court is satisfied, after a rigorous analysis, that the

prerequisites of Rule 23(a) have been satisfied," 457 U.S. at 161, has particular force here.

Nor is there any textual support for petitioners' principal rationale for evasion of the certification criteria: that the district court's finding of fairness under Rule 23(e) is a substitute for, and thus serves to meet, those criteria (Pet. 27). Indeed, both the text and structure of subsection (e) firmly supports the court of appeals' decision. First, Rule 23(e) says only that "[a] class action"—presumably the same "class action" referred to in subsection (b)—"shall not be ... compromised without the approval of the Court...." This language demonstrates that *all* "class actions," including settlement classes approved under Rule 23(e), must meet the requirements of Rules 23(a) and (b). Thus, the approval requirement of Rule 23(e) is plainly in addition to, rather than a substitute for, strict application of the certification criteria.

Nor can petitioners' Rule 23(e) argument be squared with *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156 (1974). There, the named plaintiffs argued that they should be excused from giving class members notice and opt-out rights under Rule 23(c)(2)—which applies in 23(b)(3) class actions—because "adequate representation, rather than notice, is the touchstone of due process in a class action...." *Id.* at 176. "[T]his view has little to commend it," this Court held, because "Rule 23 speaks to notice as well as to adequacy of representation and requires that both be provided." *See also id.* at 176 n.13 (class members' opt-out rights also protected). So too here, petitioners may not pick and choose which portions of Rule 23 are applicable. Rather, the members of the class are entitled to all the protections of Rule 23(e) *and* of Rules 23(a) and (b).

While the text and structure of Rule 23 is dispositive, the decision below is also fully consistent with the purpose of the Rule, which is not, as petitioners would have it (Pet. 25-27), efficiency at all costs. Rather, the principal purpose of the Rule, particularly the Rule 23(a) criteria, is protection

of absent class members, by allowing their claims to be prosecuted when their interests are allied with the class representatives, and, as this case poignantly illustrates, to avoid the extinguishment of claims *en masse* when those interests diverge. *See* 48a-51a.

On the other hand, the regime extolled by petitioners would result in a wholesale evisceration of the rights of absentees. Petitioners commend the trend in the case law not to certify mass-tort class actions for *litigation* (Pet. 17), but argue that certification requirements should be loosened to permit mass-tort *settlements*. This "construction" of the Rule would leave absent class members without any structural protections. Defendants would be the masters of the Rule, defeating mass-tort class actions when they do not like them, and employing them, as here, after they have hand-picked the class lawyers and devised a settlement to their liking.

Finally, this Court should reject petitioners' hyperbolic claim that the decision below will thwart the settlement of class actions. It is not only irrelevant to the proper construction of Rule 23, but it is wrong as well. The Third Circuit has expressly embraced the settlement class action (36a), but it has insisted that the district court apply the criteria of Rule 23(a) and (b) strictly for the protection of the absentees. Since the benefits of settlement are often enormous for both plaintiffs and defendants (*see* Pet. 16-18), the need to satisfy the class certification criteria will not generally dissuade parties from settling legitimate cases. Moreover, the very statistics relied upon by petitioners undermine their argument, because more than half of all class actions that settle have been certified for litigation. *See* Pet. 17. This demonstrates that, even if settlement classes were eliminated entirely, class actions would still settle in large numbers.

In any event, Rule 23's class certification requirements *were* intended to thwart some class actions, settlement or otherwise, in which the absentees' interests are not adequately protected. *Falcon*, 457 U.S. at 157-60. That

protection is precisely what is at stake here where the "class action" does not involve real plaintiffs who have sustained actual injuries, but is a thinly-veiled invitation for judicially imposed legislation to resolve an asserted litigation crisis. *See* Pet. 19-20. As the court below recognized (20a), if a crisis exists, it can be resolved by Congress, the institution in which the Constitution has placed responsibility for crafting prospective solutions to difficult social and legal problems.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

BRIAN WOLFMAN
Counsel of Record
ALAN B. MORRISON
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, NW
Washington, D.C. 20009
(202) 588-1000

Attorneys for Respondents White Lung Association of New Jersey, et al.

September 30, 1996